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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 421

NASH MIAMI MOTORS, INC., and
SYDNEY GINSBERG,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on April 6, 1966, rehearing having been denied on May 9, 1966.

CITATIONS TO OPINIONS BELOW

The Memorandum Findings of Fact and Opinion of the Tax Court is reported unofficially at ¶64,230 Pren-

tice-Hall Tax Court Memorandum Decisions 1964, and is printed in the Record, Volume III, at pp. 1426-1470. It is not officially reported and is printed in Appendix E hereto, *infra*, p. 22. The Decisions of the Tax Court are unreported and are printed in the Record, Volume III, at pp. 1527-1528. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra*, p. 11, is officially reported in 358 F.2d 636, and appears in the Record, Volume IV, at pp. 1548-1554.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 6, 1966, and is printed in Appendix C hereto, *infra*, p. 18. Rehearing was denied on May 9, 1966; Appendix D hereto, *infra*, p. 20. The jurisdiction of this Court is invoked under 26 U.S.C., Section 7482 and 28 U.S.C., Sections 1254(1) and 2101(c).

QUESTIONS PRESENTED

I.

Whether petitioners herein have been denied due process of law and equal protection under the law, contrary to the Fifth Amendment, United States Constitution, because compelled upon the basis of lack of wealth to challenge the validity of deficiency assessments and fraud penalties, levied by respondent, in the Tax Court of the United States, an Article I court, rather than in a court conforming to the requirements of Article III of the Constitution of the United States?

II.

Where Congress by statute allows wealthy taxpayers, who can prepay asserted tax assessments and penalties made against them by the Commissioner of Internal Revenue, access to an Article III court for the purpose of challenging and determining the validity of such asserted tax liability, may Congress under the Fifth Amendment to the United States Constitution validly discriminate against poor taxpayers, who cannot prepay such asserted assessments and penalties, by denying them access to an Article III court for such purpose?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following provisions of the United States Constitution, being lengthy, are set forth in Appendix A hereto, *infra*, p. 1:

1. Article I, Section 8, Clauses 1 and 18, U. S. Constitution

2. Article III, Section 1, and Section 2, Clauses 1 and 4, U. S. Constitution

3. Fifth Amendment, U. S. Constitution

The following statutory provisions, being lengthy, are set forth in Appendix A hereto, *infra*, p. 1:

1. 26 U.S.C. [Internal Revenue Code] §§ 6213(a), 6214, 6215(a), 7421(a), 7422, 7441-7444

2. 28 U.S.C. [Judicial Code] § 1346(a)(1)

STATEMENT OF THE CASE

Petitioner Sydney Ginsberg and his brother Charles, commencing in 1945, operated an automobile dealership on a partnership basis in Miami, Florida. During February, 1947, the Ginsbergs organized petitioner Nash Miami Motors, Incorporated, as a closely held corporate successor to the partnership (R. 1134, 1405). As a part of the corporate business, which was primarily the sale of new automobiles, used cars were received in trade and were sold immediately at wholesale to used car dealers (R. 1139).

On March 27, 1957, both the corporation and Sydney Ginsberg, individually, received statutory "90-day letters" from respondent informing them of claimed deficiencies with respect to their income tax liability for the years 1947 and 1948 as to the corporation, and 1946 and 1947 as to Sydney Ginsberg (R. 1236, 1264). The deficiencies were based primarily upon the alleged sales of used automobiles at prices higher than those reported on their respective returns for the years in question. The amounts of these alleged deficiencies were $26,728.26 for the corporation, and $67,254.60 for Sydney Ginsberg, individually. In addition to these amounts, the respondent alleged fraud and claimed a 50% penalty on these amounts. Thus petitioners, some ten years after the claimed years of deficiency, were presented with tax bills totalling $140,974.31 (R. 1236, 1264).

Unable to pay these deficiency assessments and penalties prior to contesting them, petitioners filed petitions for redetermination in the Tax Court of the United States on June 17, 1957 (R. 1229, 1254, 1331-1332, 1344-1346). Respondent filed Answers (R. 1240, 1269) affirmatively alleging fraud, which were twice required to be amended on petitioner's motion. In its reply to respondent's affirmative allegations of fraud in the Second Amended Answer (R. 1330-1332), petitioner Nash Miami Motors raised the constitutional issues passed upon by the Court of Appeals below and which petitioners seek to have this Court review.

The Tax Court held that by initiating proceedings in that Court, petitioners had waived the right to challenge the constitutionality of its enabling legislation (R. 1469); Appendix E, *infra*, p. 66.

The Court below declined to adopt this ground, recognizing the possibility that the only way to question the constitutionality of the Tax Court is first to invoke its jurisdiction, Appendix B, *infra*, p. 13; 358 F.2d at 637.

The Court below went on, however, relying upon the breadth of the sovereign's power over taxes, and ruled valid the statutory classifications now drawn, that is, those which afford complaining taxpayers able to prepay claimed deficiency assessments and penalties with an Article III forum, judges, and Article III jurisprudence, yet afford taxpayers unable to prepay such amounts, only an Article I forum, judges, and jurisprudence.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

This case raises substantial and important questions of federal constitutional law which were implicit in this Court's decision in *Flora vs. United States*, 362 U.S. 145 (1960), and made plainly evident by the subsequent case of *Glidden Company vs. Zdanok*, 370 U.S. 530 (1962).

In *Flora* it was held that *payment in full* of all tax deficiency and penalty assessments was a necessary prerequisite under 28 U.S.C. §1346 (a) (1) for challenging the validity of such assessments in the United States Court of Claims or in United States District Courts. This Court there rejected a statutory construction which would have permitted partial payments of alleged deficiencies and suits for recovery in these courts, stating with respect to the present scheme:

> "The result is a system in which there is one tribunal for prepayment litigation and another for post-payment litigation, with no room contemplated for a hybrid of the type proposed by petitioner." 362 U.S. at 163.

The Court recognized that:

> "***a decision in petitioner's favor could be expected to throw a great portion of the Tax Court litigation into the District Courts." 362 U.S. at 176.

Implicit in this statement is a recognition of peti-

tioners' basic contention in the present case, that is, that Congress has provided substantially different standards of justice for complaining taxpayers based solely upon a criterion of ability to pay.

By statute Congress has decreed that, for those taxpayers able to pay the price, a trial forum[1] is available which is established under Article III of the Constitution of the United States and presided over by judges whose independence is guaranteed by the particular provisions of Article III, and which applies (in the case of District Courts) at the trial level a body of law approved by the United States Court of Appeals for its particular Circuit.

Similarly by statute, however, Congress has provided for those taxpayers unable to pay in advance, a trial forum established under Article I of the Constitution (i.e., the Tax Court), presided over by "Judges" whose independence is unprotected by constitutional guarantee, and which applies a body of law which may differ substantially from that approved by the United States Court of Appeals for the taxpayer's circuit; see, e.g., *A. L. Lawrence*, 27 T. C. 713 (1957).

This distinction between an Article III forum and an Article I forum is not an idle or meaningless one, as demonstrated by the several opinions in *Glidden Company vs. Zdanok*, 370 U.S. 530 (1962). There it was held that the United States Court of Claims and the Court of Customs and Patent Appeals are courts established under Article III of the Constitution, overruling *Ex Parte Bakelite Corp.*,

[1]I.e., U. S. District Courts and the Court of Claims; See *Glidden Company vs. Zdanok, supra.*

279 U.S. 438 (1929), and *Williams vs. United States*, 289 U.S. 553 (1933). The dissenting opinion in *Glidden* argued with force, and the majority opinions carefully considered, the differences in outlook and independence between judges who sit pursuant to Article III and those who hold office under Article I. This difference is of particular importance where the Government itself is a party with adverse interests in the litigation. In the present context it is not in the least abstract or theoretical to question the independence and outlook of Tax Court judges who are appointed for a term of years to an "executive agency",[2] and who can be removed by the President,[3] yet are called upon to exercise solely judicial powers,[4] to find facts, and to determine traditional legal issues such as fraud involving large penalty levies.

Affording an Article III trial forum solely to those who can buy access to it, strikes deeply into fundamental concepts of fairness. If a hearing before an Article III trial court is provided for some, it cannot be denied to others solely because they cannot pay the price.

It is this difference in treatment, redounding to the substantial benefit of the Government in practical terms,[5]

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[2]26 U.S.C. 7441.

[3]26 U.S.C. 7443 (f).

[4]*Stern vs C. I. R.* (3 Cir. 1954), 215 F. 2d 702; *Reo Motors vs. C. I. R.* (6 Cir. 1955), 219 F. 2d 610.

[5]The Annual Reports of the Commissioner of Internal Revenue for the years 1961 - 1965 show the percentage of tax cases won or partially won, on a comparative basis, as between Article III forum litigation (the U. S. District Courts and the Court of Claims) and Article I forum litigation (the Tax Court). The percentage won or partially won by the Government in the Tax Court is significantly higher. See Annual Report of C. I. R. for 1961, p. 59; Annual Report of C. I. R. for 1962, p. 70; Annual Report of C. I. R. for 1963, p. 37;

which petitioners contend violates due process of law and equal protection under the laws as guaranteed by the Fifth Amendment. Cf. *Bolling vs. Sharpe*, 347 U.S. 497 (1954); compare *Hurd vs. Hodge*, 334 U.S. 24 (1948), with *Shelley vs. Kraemer*, 334 U.S. 1 (1948).

The thrust of petitioner's complaint is not directed, as assumed by the Court below, toward a mere preference "* * * to litigate their case in the District Court without first having paid the taxes." Appendix "B", *infra*, p. 16; 358 F.2d at 638. Rather, the thrust of this argument is directed toward the inequity and invidious discrimination inherent in a system where wealthy litigants able to pay

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Annual Report of C. I. R. for 1964, p. 31; Annual Report of C. I. R. for 1965, p. 44. The following tables are based upon the information therein published:

TAX COURT

	'60	'61	'62	'63	'64	'65
Won by Government	676	313	275	293	272	235
Lost by Government	73	108	93	109	100	84
Partially won by Government	154	159	163	159	143	179
Percent won or partially won	92	81	82	81	81	83

DISTRICT COURT

	'60	'61	'62	'63	'64	'65
Won by Government	168	166	192	166	227	215
Lost by Government	170	192	213	200	180	145
Partially won by Government	43	39	44	56	45	45
Percent won or partially won	55	52	53	53	60	64

COURT OF CLAIMS

	'60	'61	'62	'63	'64	'65
Won by Government	43	17	27	34	14	40
Lost by Government	21	24	23	12	15	13
Partially won by Government	6	5	6	18	7	15
Percent won or partially won	70	48	59	81	58	81

the amount in controversy can buy access to an Article III forum, judge and law, while those unable to come up with "cash in advance" are relegated to an Article I forum, judge and law.[6] This is to say, that the Tax Court of the United States, if it is to accord equal justice to those taxpayers required to seek relief in that forum, *must be established as an Article III forum* on a parity with the District Courts and Court of Claims of the United States.

Congress might, as it has in the past, provide a solely judicial remedy for complaining taxpayers (viz., the situation prior to the creation of the Board of Tax Appeals in 1924), or it might provide a solely administrative remedy (viz., the present situation in regard to certain kinds of tax controversies, e.g., 26 U.S.C. §732),[7] or both. What petitioners contend that Congress may not constitutionally establish is the system as presently constituted, with the right to an Aricle III trial forum available only for those able to afford them, and an Article I trial forum for those unable to pay in advance.

This anomolous and discriminatory situation has not

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[6]The system thus enacted by Congress gives an "option of either an administrative or a legal remedy" (*Tutun v. United States* (1926), 270 U.S. 568 at 576-577) only to those who can afford to choose the legal remedy by paying in full and in advance the asserted liability as claimed by the tax officials. Where, as here, the claim is made some ten years after the tax returns were filed, with heavy fraud penalties added to the alleged deficiencies, only a taxpayer with much accumulated capital could afford to invoke the judicial remedy. In short, the present system discriminates against a taxpayer without accumulated capital sufficient to pay in advance whatever tax deficiency plus penalties an appointed executive functionary may claim he owes.

[7]See *Willmut Gas & Oil Co. vs. Fly* (5 Cir. 1963), 322 F. 2d 301, cert. den., 375 U.S. 984.

gone unrecognized by Congress,[8] and it is respectfully submitted that this Court is presented in this case with the constitutional issue and should provide the impetus for corrective action by Congress, by declaring the present statutory scheme unconstitutional as in violation of the Fifth Amendment.

The Court below also misconceived petitioners' argument to be an attack, in principle, upon all administrative agencies. This is not such an attack. The Tax Court of the United States is unique among "independent agencies" in that it exercises and possesses *solely* judicial powers and functions. In this, and in the "ability to pay" aspect of its jurisdiction, it differs substantially from all other agencies. In no other governmental situation is ability to pay the sole and determinative criteria for securing an Article III trial forum.

The Government has previously taken the position that the Tax Court is something in the nature of an "extra added attraction" for taxpayers, to which they have no right, and therefore they cannot be heard to complain of

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[8]Statement by Representative Hays, Congressional Record, June 16, 1948, p. 8678:

"The House, by an overwhelming vote, approved the transfer of the Tax Court from the executive to the judicial branch of the government. Our position is impregnable from the standpoint of logic and constitutional intent, yet because of certain incidents in the peculiar history of this splendid court, it is classified technically as an agency of the executive branch. No one can question the fact that it is a court legislatively established as prescribed by the Constitution. The amendment to which we are asked to agree defeats the action of the House in approving its transfer to the department where it logically belongs. Our concurrence with the Senate (in agreeing to the Senate Amendments) perpetuates one of the strangest anomalies in the government."

discrimination as to its operation vis-a-vis the other forums available "for a price." This position was adopted by the Court below. But this position should fail for several reasons.

The Government may not be constitutionally required to provide an Article III forum to taxpayers disputing their taxes, but if it does, it should not be allowed to condition access to that forum on the basis of ability to pay unless it provides a similarly independent forum for those unable to pay cash in advance.

In addition, the Tax Court has been operative (as the Board of Tax Appeals until 1942) since 1924, or since the payment of income taxes has become a substantial factor in the life of the Nation. Although the Constitution might not require any particular type of forum for the hearing of tax complaints, "[o]ur system of taxation is based upon voluntary assessment and payment * * *", *Flora vs. United States*, 362 U.S. at 176, and there can be no doubt that such a system would cease to function where no forum whatever were available for taxpayers who can not pay the total asserted assessment and penalty in advance. The *Flora* decision might well have been decided differently in the absence of any forum for prepayment litigation. In short, the Tax Court as a practical matter is essential to our voluntary system of taxation. In no sense is it merely an "extra added attraction" nor can it consistent with the Constitution be less independent than the other forums available to wealthier taxpayers.

The question which petitioners seek to have this Court review is whether the "certain circumstances . . ." (Ap-

pendix "B", *infra*, p. 16; 358 F. 2d at 638) referred to by the Court below, which determine the character of the hearing provided to a complaining taxpayer, Article III or Article I, can be *solely* wealth.

What the petitioners here demand is an equality of treatment with their wealthier peers. They seek a tribunal which provides them with a truly judicial hearing, supported by that independence of outlook and guarantees of judicial independence which are provided by Article III.

The Tax Court renders decisions which are final and binding upon the complaining taxpayer, 26 U.S.C. §7482, subject only to review by the Courts of Appeals and this Court. No longer does the complaining taxpayer have a right to re-litigate the matter *de novo* if he loses in the Tax Court and can subsequently raise the sum for post-payment litigation. *Old Colony Trust Co. v. C.I.R.*, 279 U.S. 716 (1929). No longer can a taxpayer make partial payment and sue to recover that amount. *Flora vs. United States, supra.*

If Congress created two courts, one a legislative court under Article I and the other a judicial court under Article III, with concurrent jurisdiction over the same types of controversies, but expressly limited access to the Article III court to persons with a net worth of over $1,000,000.00, the discrimination involved would be obvious and clearly unconstitutional. In practical effect that is exactly what Congress has done in the field of tax cases.

Equal protection under the laws becomes a mockery when litigants are segregated into substantially different

forums, providing substantially different standards of justice, based solely upon ability to pay.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted, and the judgments of the Tax Court below vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served this 4th day of August, 1966, upon the following persons by depositing four copies of same addressed to each in the United States mail with sufficient air mail postage prepaid:

Honorable Thurgood Marshall
Solicitor General
United States Department of Justice
Washington, D. C. 20530

Honorable Mitchell Rogovin
Assistant Attorney General
Tax Division
United States Department of Justice
Washington, D. C. 20530.

Of Counsel for Petitioners

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Appendix To Petition for a Writ of Certiorari To the United States Court of Appeals for the Fifth Circuit

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APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions Involved:

1. U. S. Constitution, Article I, Section 8, Clauses 1 and 18:

"The Congress shall have Power to lay and collect

Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

" * * *

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

2. U. S. Constitution, Article III, Section 1:

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office."

3. U. S. Constitution, Article III, Section 2, Clauses 1 and 4:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; * * * to Controversies to which the United States shall be a Party; * * *."

4. U. S. Constitution, Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statutory Provisions Involved:

1. 26 U.S.C. (Internal Revenue Code), Section 6213(a):

"(a) Time for filing petition and restriction on assessment.—Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period,

as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court."

2. 26 U.S.C. (Internal Revenue Code), Section 6214:

"(a) Jurisdiction as to increase of deficiency, additional amounts, or additions to the tax.—The Tax Court shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any additional amount, or addition to the tax should be assessed, if claim therefor is asserted by the Secretary or his delegate at or before the hearing or a rehearing."

"(b) Jurisdiction over other years.—The Tax Court in redetermining a deficiency of income tax for any taxable year or of gift tax for any calendar year shall consider such facts with relation to the taxes for other years as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other year has been overpaid or underpaid.

"(c) Final decisions of tax court.—For purposes of this chapter and subtitles A or B the date on which a decision of the Tax Court becomes final shall be deter-

mined according to the provisions of section 7481. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 773."

3. 26 U.S.C. (Internal Revenue Code), Section 6215(a):

"(a) General rule.—If the taxpayer files a petition with the Tax Court, the entire amount redetermined as the deficiency by the decision of the Tax Court which has become final shall be assessed and shall be paid upon notice and demand from the Secretary or his delegate. No part of the amount determined as a deficiency by the Secretary or his delegate but disallowed as such by the decision of the Tax Court which has become final shall be assessed or be collected by levy or by proceeding in court with or without assessment."

4. 26 U.S.C. (Internal Revenue Code), Section 7421(a):

"Tax.—Except as provided in sections 6212(a) and (c), and 6213,(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

5. 26 U.S.C. (Internal Revenue Code), Section 7422:

"(a) No suit prior to filing claim for refund.—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive

or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof."

"(b) Protest or duress.—Such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress.

"(c) Suits against collection officer a bar.—A suit against any officer or employee of the United States (or former officer or employee) or his personal representative for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected shall be treated as if the United States had been a party to such suit in applying the doctrine of res judicata in all suits instituted after June 15, 1942, in respect of any internal revenue tax, and in all proceedings in the Tax Court and on review of decisions of the Tax Court where the petition to the Tax Court was filed after such date.

"(d) Credit treated as payment.—The credit of an overpayment of any tax in satisfaction of any tax liability shall, for the purpose of any suit for refund of such tax liability so satisfied, be deemed to be a payment in respect of such tax liability at the time such credit is allowed.

"(e) Stay of proceedings.—If the Secretary or his

delegate prior to the hearing of a suit brought by a taxpayer in a district court or the Court of Claims for the recovery of any income tax, estate tax, or gift tax (or any penalty relating to such taxes) mails to the taxpayer a notice that a deficiency has been determined in respect of the tax which is the subject matter of taxpayer's suit, the proceedings in taxpayer's suit shall be stayed during the period of time in which the taxpayer may file a petition with the Tax Court for a redetermination of the asserted deficiency, and for 60 days thereafter. If the taxpayer files a petition with the Tax Court, the district court or the Court of Claims, as the case may be, shall lose jurisdiction of taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of taxpayer's suit for refund. If the taxpayer does not file a petition with the Tax Court for a redetermination of the asserted deficiency, the United States may counterclaim in the taxpayer's suit, or intervene in the event of a suit as described in subsection (c) (relating to suits against officers or employees of the United States), within the period of the stay of proceedings notwithstanding that the time for such pleading may have otherwise expired. The taxpayer shall have the burden of proof with respect to the issues raised by such counterclaim or intervention of the United States except as to the issue of whether the taxpayer has been guilty of fraud with intent to evade tax. This subsection shall not apply to a suit by a taxpayer which, prior to the date of enactment of this title, is commenced, instituted, or pending in a district court or the Court of Claims for the recovery of any income tax, estate tax, or gift tax (or any penalty relating to such taxes)."

6. 26 U.S.C. (Internal Revenue Code), Section 7441:

"The Board of Tax Appeals shall be continued as an independent agency in the Executive Branch of the Government, and shall be known as the Tax Court of the United States. The members thereof shall be known as the chief judge and the judges of the Tax Court. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 879."

7. 26 U.S.C. (Internal Revenue Code), Section 7442:

"The Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title, by chapters 1, 2, 3, and 4 of the Internal Revenue Code of 1939, by title II and title III of the Revenue Act of 1926 (44 Stat. 10-87), or by laws enacted subsequent to February 26, 1926. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 879."

8. 26 U.S.C. (Internal Revenue Code), Section 7443:

"(a) Number.—The Tax Court shall be composed of 16 members.

"(b) Appointment.—Judges of the Tax Court shall be appointed by the President, by and with the advice and consent of the Senate, solely on the grounds of fitness to perform the duties of the office.

"(c) Salary.—Each judge shall receive salary at the rate of $22,500 per annum, to be paid in monthly installments.

"(d) Expenses for travel and subsistence.—Judges of the Tax Court shall receive necessary traveling expenses, and expenses actually incurred for subsistence while traveling on duty and away from their designated stations, subject to the same limitations in amount as

are now or may hereafter be applicable to the United States Customs Court.

"(e) Term of office.—The terms of office of all judges of the Tax Court shall expire 12 years after the expiration of the terms for which their predecessors were appointed; but any judge appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor.

"(f) Removal from office.—Judges of the Tax Court may be removed by the President, after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other cause.

"(g) Disbarment of removed judges.—A judge of the Tax Court removed from office in accordance with subsection (f) shall not be permitted at any time to practice before the Tax Court. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 879, amended Mar. 2, 1955, c. 9, 69 Stat. 10."

9. 26 U.S.C. (Internal Revenue Code), Section 7444:

"(a) Seal.—The Tax Court shall have a seal which shall be judicially noticed.

"(b) Designation of chief judge.—The Tax Court shall at least biennially designate a judge to act as chief judge.

"(c) Divisions.—The chief judge may from time to time divide the Tax Court into divisions of one or more

judges, assign the judges of the Tax Court thereto, and in case of a division of more than one judge, designate the chief thereof. If a division, as a result of a vacancy or the absence or inability of a judge assigned thereto to serve thereon, is composed of less than the number of judges designated for the division, the chief judge may assign other judges to the division or direct the division to proceed with the transaction of business without awaiting any additional assignment of judges thereto.

"(d) Quorum.—A majority of the judges of the Tax Court or of any division thereof shall constitute a quorum for the transaction of the business of the Tax Court or of the division, respectively. A vacancy in the Tax Court or in any division thereof shall not impair the powers nor affect the duties of the Tax Court or division nor of the remaining judges of the Tax Court or division, respectively. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 880."

10. 28 U.S.C. (Judicial Code), Section 1346(a)(1):

"(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

"(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

APPENDIX B

In The

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

No. 22393

NASH MIAMI MOTORS, INC., and
SYDNEY GINSBERG,

Petitioners,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petitions for Review of Decisions of the Tax Court of the United States (Florida case.)

(April 6, 1966.) (358 F.2d 636)

Before PHILLIPS,* RIVES and COLEMAN, Circuit Judges.

RIVES, Circuit Judge: This is a petition to review the third in a trilogy of cases involving the same transactions wherein the United States charged that Charles and Sydney Ginsberg with their controlled enterprise fraudulently under reported taxable income. In *Ginsberg v. United States*, 257 F.2d 950 (5th Cir. 1958) this Court

*Of the Tenth Circuit, sitting by designation.

reversed a criminal conviction of Sydney Ginsberg. Prior to retrial a plea of *nolo contendere* was entered and that branch of the Government's effort was concluded. In *Ginsberg's Estate v. Commissioner*, 271 F.2d 511 (5th Cir. 1959) this Court affirmed the Tax Court's unreported decision sustaining the Commissioner's assessment of back taxes and civil fraud penalties against the estate of Charles Ginsberg and his widow. The petitioner in the present case, Sydney Ginsberg, appeals from an adverse decision of the Tax Court as to his civil ability for back taxes and civil fraud penalties for the years 1946 and 1947. Copetitioner, Nash Miami Motors, Inc., appeals from the Tax Court's determinations for its fiscal years ending November 30, 1947 and 1948.

Sydney Ginsberg and his brother Charles, now deceased, operated a partnership known as "Nash Motors" in Miami, Florida. On February 5, 1947 they organized Nash Miami Motors, Incorporated as successor to Nash Motors. As incident to their new car sales, they received and disposed of used cars. The Government charged that in the sale of used cars Sydney Ginsberg through his controlled corporation, Nash Miami, sold used cars for a greater price than that which was reflected on the corporate books, tax return, or his individual tax return. In the Court a broad attack is made on numerous points all of which we have carefully reviewed and found to be entirely without merit. Most of the points raised had been thoroughly considered by the Tax Court. On the record now before us, we think that Court properly rejected these contentions. As to all of the unconstitutional matters the

Tax Court applied the proper law and the record amply supports its factual determinations.

In the Tax Court and again here on appeal petitioners attack the constitutionality of the Tax Court. In their brief they say:

> "It is submitted that the Tax Court exercises judicial power and since the Tax Court judges do not sit during good behavior and have undiminishable compensation, the Court is in violation of Article III. In addition the Court is in the Executive branch of the government, and by exercising judicial power, the doctrine of separation of powers is violated."

The Tax Court believed that by invoking its jurisdiction petitioners waived the right to question its constitutionality. Since it is possible that the only way that the Tax Court's constitutionality can be questioned is to first invoke its jurisdiction, we are not inclined to dispose of this issue on the ground of waiver.

The Supreme Court has clearly and consistently held that functions such as those performed by the Tax Court can be entrusted by Congress to a legislative court, the judges of which are not endowed with the guarantees of Article III, §1 of the Constitution (*Ex parte Bakelite Corp.*, 279 U.S. 438, (1929), at 451-52):

> "Legislative courts also may be created as special tribunals to *examine and determine various matters, arising between the government and*

others, which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.

"*Conspicuous among such matters are claims against the United States.* These may arise in many ways and may be for money, lands or other things. They all admit of legislative or executive determination, and yet from their nature are susceptible of determination by courts; but no court can have cognizance of them except as Congress makes specific provision therefor. Nor do claimants have any right to sue on them unless Congress consents; and Congress may attach to its consent such conditions as it deems proper, *even to requiring that the suits be brought in a legislative court specially created to consider them.*" (Emphasis added.)

We have carefully considered all of the cases cited to us by counsel and can find no authority holding that Congress was powerless to extend this convenient administrative remedy to taxpayers wishing to invoke its jurisdiction. The long and useful history of such agencies as the National Labor Relations Board and the Tax Court cannot be so easily overcome. This issue was before this Court in *Nash Miami Motors, Inc. v. United States*, 337 F.2d 382 (5 Cir. 1964). In our opinion *Willmut Gas & Oil Co.*

v. Fly, 322 F.2d 301 (5 Cir. 1963), *cert. den.*, 375 U.S. 984, relied on in *Nash Miami Motors v. United States*, *supra*, is ample authority for rejecting petitioners' contentions. On oral argument petitioners sought to distinguish *Willmut* on the ground that the Internal Revenue Code does not presume the Commissioner to be right about his allegation of fraud. This argument misses the point since the question is solely whether Congress can entrust primary determination of the issue to an administrative body. If it can, then the ground rules as to who is presumed right are a matter to be left as Congress in its wisdom determines, and the taxpayer cannot complain that Congress has stacked the scales in his favor. Following the unsuccessful attempt to get the Tax Court declared unconstitutional in *Nash Miami Motors v. United States*, 337 F.2d 382 (5 Cir. 1964), mandamus was sought against Judge Fulton in the Supreme Court. The Supreme Court was asked to order Judge Fulton to call a three-judge court to consider the constitutionality of the Tax Court. The petition was promptly denied by the Supreme Court. *Ginsberg, Trustee v. Fulton, U. S. Judge*, 283 U.S. 805 (1965).

In waiving sovereign immunity and creating rights in individuals against the United States, Congress may provide "only an administrative remedy," or it may grant the claimant only a judicial remedy, or it "may give to the individual the option of either an administrative or a legal remedy." *Tutun v. United States*, 270 U.S. 568, 576-577; *Glidden Co. v. Zdanok*, 370 U.S. 530, 573.

As the Supreme Court recognized in *Flora v. United States*, 362 U.S. 145 (1960), Congress has given the taxpayer two possible remedies: In certain circumstances he may litigate in the Tax Court subject to review by the courts of appeals and by the Supreme Court; in certain other circumstances he may sue in the district court or Court of Claims subject to appellate review. The real thrust of petitioners' complaint is simply that they would have preferred to litigate their case in the district court without first having paid the taxes. This equal protection type argument was also, we believe, disposed of by the rationale of *Willmut*. *Cf. Flora v. United States*, 362 U.S. 145 (1960), at 175-177.

In *Willmut* the taxpayer could only raise its contention that its tax bill was too high in the Tax Court, because Congress under the statutory section there in question had vested exclusive jurisdiction in the Tax Court. The rationale of *Willmut* is that the sovereign's power over taxes is very broad and that it can require the payment of the assessed tax on a determination by the Commissioner as a precondition to judicial review. See *Flora v. United States*, 362 U.S. 145 (1960). Surely then the sovereign can permit delay of payment pending an administrative review of the Commissioner's determination. In this case petitioners have had a full administrative review and every reasonable opportunity to build a record to support their position. This Court has fully reviewed that record and the arguments presented by petitioners. Thus they have been before both an administrative body and an Article III court. The case having reached this posture, we can see

no constitutional objection to the sovereign law collecting the taxes and civil penalties found to be due and owing. The decision is therefore

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

October Term, 1965

No. 22393

D. C. Docket Nos. 68315 and 68316
NASH MIAMI MOTORS, INC., and
SYDNEY GINSBERG,

Petitioners,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petitions for Review of Decision of the Tax Court of the United States (Florida case.)

Before PHILLIPS,* RIVES and COLEMAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of Nash Miami Motors, Inc., and Sydney Ginsberg, for review of a decision of the Tax Court of the United States, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decision of the Tax Court in this cause be, and the same is hereby, affirmed.

April 6, 1966

*Of the Tenth Circuit,
sitting by designation.
Issued as Mandate: May 18, 1966

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22393

NASH MIAMI MOTORS, INC.,
and SYDNEY GINSBERG,
Petitioners,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petitions for Review of Decisions of the Tax Court of the United States (Florida case.)

(May 9, 1966)

ON PETITION FOR REHEARING

Before PHILLIPS,* RIVES and COLEMAN, Circuit Judges.

PER CURIAM:

We do not agree with the petitioners that *Ex parte Bakelite Corp.*, 1929, 279 U.S. 438, was overruled on the

point here pertinent in *Glidden Company* v. *Zdanok*, 1962, 370 U.S. 530, 549, 550, 573. The petition for rehearing is

DENIED.

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* Of the Tenth Circuit, sitting by designation.

APPENDIX E

MEMORANDUM FINDINGS OF FACT AND OPINION.

Tax Court of the United States

Filed August 31, 1964.

(Title Omitted)

T. C. Memo 1964-230.

Nash Miami Motors, Inc., and its predecessor partnership Nash Miami Motors, were engaged in the business of selling new and used automobiles. Sydney Ginsberg and his brother, Charles, were the principal officers and stockholders of the corporation and equal partners in the partnership. In selling used cars, Sydney and Charles at times invoiced the purchaser for an amount less than the negotiated sales prices of the cars sold and required the purchasers to pay the balance of the negotiated sales prices in cash, which was not reported in the income of the corporation or the partnership. Held:

1. That Sydney's distributive share of the income from the partnership was understated by reason of the failure of the partnership to report all income from the sale of used cars.

2. That the unreported proceeds from the sale of used cars on behalf of the corporation constituted additional income to the corporation.

3. That one-half of the unreported proceeds from

the sale of used cars by the corporation constituted dividend income to Sydney.

4. That part of the deficiencies in income tax of Sydney for 1946 and 1947 and of Nash Miami Motors, Inc., for its fiscal years ended November 30, 1947 and 1948, were due to fraud with intent to evade tax.

5. That assessment and collection of the deficiencies against both petitioners are not barred by the statute of limitations.

6. That a purported loss on the transfer of realty from the partnership to the corporation was not deductible in determining Sydney's distributive share of the partnership income for its fiscal year 1947.

7. That Sydney's distributive share of partnership income for 1947 was understated due to an unwarranted writedown of partnership inventories, but that respondent's determination should be adjusted for breakages and shortages in inventories.

8. That petitioners, having invoked the jurisdiction of this Court by filing a petition for redetermination herein, may not challenge the qualifications of judges of this Court to determine the issues raised in this proceeding on the ground that they are not appointed for a term of their good behavior as provided in Article III, Section 1, of the Constitution of the United States.

Daniel L. Ginsberg,1 for the petitioner in Docket No. 68315.

Forney B. Stafford and Richard C. Carter, Jr., for the petitioner in Docket No. 68316.

Kenneth G. Anderson, for the respondent.

Drennen, Judge: In these consolidated proceedings respondent determined deficiencies in income tax of petitioners and additions to tax under section 293(b), I.R.C. 1939,2 as follows:

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1 Daniel L. Ginsberg is also counsel of record in Docket No. 68316.

2 All statutory references are to the Internal Revenue Code of 1939 unless otherwise indicated.

Docket No.	Petitioner	Year	Deficiency	
			Income tax	Addition to tax sec. 293(b)
68315	Nash Miami Motors, Inc.	FYE— Nov. 30, 1947	$17,906.07	$ 8,953.04
		Nov. 30, 1948	8,222,19	4,411.10
		Calendar		
68316	Sydney Ginsberg	1946	2,655.79	1,327.90
		1947	64,598.81	32,299.41

The issues for decision are:

(1) Whether Sydney Ginsberg understated his distributive share of partnership net income of Nash Miami Motors, a partnership, for the years 1946 and 1947 by failing to include in his share a part of the proceeds from the sales of used automobiles sold by the partnership which the partnership failed to report in its partnership returns of income for its fiscal years ended May 31, 1946 and 1947;

(2) Whether Nash Miami Motors, Inc., a corporation, understated its income from the sales of used automobiles on its tax returns for its fiscal years ended November 30, 1947 and 1948;

(3) Whether Sydney Ginsberg received from Nash Miami Motors, Inc., during the calendar year 1947 income taxable as dividends which he failed to report as income in his tax return for 1947;

(4) Whether Sydney Ginsberg's distributable share of net income from Nash Miami Motors, a partnership, for 1947 was understated because it reflected deductions taken by the partnership on its partnership return of income for its fiscal year ended May 31, 1947, for:

(a) A loss on the sale of partnership real estate;

(b) An adjustment made to its inventory of parts and supplies;

(5) Whether any part of the deficiencies in income

tax of petitioners for the years involved was due to fraud with intent to evade tax;

(6) Whether the applicable statute of limitations bars assessment and collection of the deficiencies; and

(7) Whether a judge of this Court is qualified to hear and determine the issues raised in the pleadings in light of the fact that he is appointed for a term of years rather than during good behavior as required by Article III, Section 1, of the Constitution of the United States.

Petitioners introduced no evidence and made no arguments on brief with respect to other issues raised by the pleadings which will therefore be considered abandoned.

General Findings of Fact.

The stipulated facts are incorporated herein by reference.

Sydney Ginsberg, hereinafter referred to as Sydney, resided in Miami Beach, Fla., during the years 1946 and 1947 and filed individual income tax returns for those years with the collector of internal revenue at Jacksonville, Fla.

Nash Miami Motors, Inc., a Florida corporation with its principal place of business in Miami, Fla., hereinafter referred to as the Nash corporation, filed corporation income tax returns for its fiscal years ended November 30, 1947 and 1948, with the collector of internal revenue at Jacksonville, Fla.

Nash Miami Motors, a partnership hereinafter referred to as the Nash partnership, filed partnership returns of income for its fiscal years ended May 31, 1946 and 1947, with the collector of internal revenue at Jacksonville, Fla.

Charles J. Ginsberg, a brother of Sydney, hereinafter referred to as Charles, died testate September 22, 1948 Sydney was named executor of his estate in Charles' will and he was duly qualified and served as such from 1948 until 1957.

Sydney and Charles were 2 years apart in age and were closely associated in business for many years prior to Charles' death in 1948. They were first associated in business with their father. From 1930 until 1938 Sydney and Charles, as partners, operated an agency for the sale of Ford automobiles in Detroit, Mich., known as Ginsberg Motor Sales. That business was terminated in 1938 and thereafter the brothers started and engaged in a business known as Lincoln Builders, in Detroit, subdividing land and building and selling houses, which continued until 1944. Sydney moved to Miami in 1944 and Charles also moved there about 6 months later.

Prior to November 1, 1945, Sydney and Charles obtained a Nash new car dealer's franchise for the city of Miami and on November 1, 1945, formed a partnership known as Nash Miami Motors for the purpose of selling new Nash automobiles. Each brother owned a one-half interest in the partnership, which continued in this business until February 1947. On February 5, 1947, the Nash corporation was organized to take over and operate the

partnership business, as of February 1, 1947. The corporation continued to operate the Nash dealership throughout the period here involved.

When the Nash corporation was organized, 20 shares of its stock were issued at $1,000 per share, or a total of $20,000. Ten shares of the stock were issued to Charles, 9 shares to Sydney, and 1 share to Daniel Ginsberg, a son of Sydney. Charles was president of the corporation from its inception until his death in 1948; Sydney was secretary and treasurer during this time and succeeded to the presidency on Charles' death, at which time Sydney's sons, Burton and Daniel, became vice president and treasurer, and secretary, respectively.

When the Nash partnership started in business, it occupied a lot on the Venetian Causeway owned by the two partners in behalf of the partnership, which they had acquired at a cost of $35,002.70. Sometime during the first quarter of 1946 a building was constructed on this property by the partnership at a cost of $160,043.38. Construction of the building was financed in part by a $100,000 mortgage on the property dated October 14, 1946. This building was in part a garage and in part an automobile showroom. This property was thereafter used, first by the partnership and thereafter by the corporation, to conduct the automobile dealership business.

On or about February 18, 1947, Venetian Realty Corp., hereinafter referred to as Venetian Realty, was organized to, and did, take over the above real estate. The land and building were conveyed to Venetian Realty by Sydney and Charles and their wives, by deed dated January 31, 1947, recorded May 1, 1947. The consideration

for the conveyance was the assumption of the mortgage on the property, having a balance due of $97,500, and the issuance of a promissory note payable to the Nash partnership in the amount of $32,500. Upon its organization, Venetian Realty issued 10 shares of its stock for $1,000 per share, 1 share to each of Charles and Sydney, and 4 shares to each of their wives, who continued to hold this stock throughout the period here involved. After the conveyance of the property to Venetian Realty, Venetian Realty rented the property to the Nash corporation for a rental of $2,500 per month.

Issues 1, 2, and 3. Whether the Nash partnership and the Nash corporation failed to include in their gross income a part of the sales price of certain used cars sold to used car dealers and others, and whether, as a result thereof, Sydney understated his income for 1946 and 1947 by failing to include therein his correct distributive share of the partnership net income, and amounts received from the corporation taxable to him as dividends.

Findings of Fact.

The Nash partnership and its successor, the Nash corporation, sometimes hereinafter referred to collectively as Nash, conducted an automobile sales agency in Miami, Fla., during the years 1946-48. While their primary business was selling new Nash automobiles, they also sold used cars taken in trade on the sale of new cars; however, they did not operate a used car sales lot as such. They also sold automobile parts and operated a garage for servicing and repairing automobiles. During the period here involved most of the used cars sold by the partnership and the cor-

poration were sold at wholesale to various used car dealers in the Miami area, and the rest were sold at retail to others, including individuals. The used cars sold to dealers were sold in the condition they were in when acquired, without being cleaned up or repaired by Nash.

Due to the scarcity of new cars in the immediate post-war period the demand for new and used cars exceeded the supply. As a result the prices of used cars were somewhat inflated during 1946 and 1947 and dealers in new cars who came into possession of used cars, including Nash, were able to sell the used cars to dealers and others at relatively high prices. This situation eased somewhat in 1948 as the supply of new cars caught up with the demand.

Both Sydney and Charles were active in the conduct of the business of the Nash partnership and the Nash corporation. Included among their activities was the selling of new and used cars, Sydney was more active in the selling of new cars and Charles was more active in the selling of used cars; however, both participated in the sale of used cars. One brother or the other, or both, always dealt with the used car dealers and determined the price at which the used cars were sold.

When a used car was acquired by Nash as a trade-in on a new car sale, it was assigned a number and an employee in the office of Nash recorded the make of car, model, year, engine number, cost and other information with respect thereto. When a used car or used cars were sold either Sydney or Charles would give the office manager or bookkeeper a note or oral instructions that used cars assigned such and such numbers had been sold to a

named purchaser, and the price for which each car was sold. Checks and/or cash, in the amount of the stated sales prices, were usually left with the bookkeeper. Invoices typed in duplicate were thereupon prepared indicating the cars sold, to whom sold, and the sales prices. The amounts shown on the invoices as the selling prices of the used cars sold were the amounts entered on the respective books of the partnership and the corporation as the selling price of the automobiles sold. The amounts shown on the invoices and recorded on the books of the business as the selling prices of the used cars sold were the amounts reported on the tax returns of the partnership and the corporation as the proceeds from the sale of used cars. The employee who prepared the invoices and made the book entries had no knowledge of the prices at which the cars were sold other than what he or she was told by Sydney or Charles. The duplicates of the invoices were kept by the partnership and the corporation and the originals were usually given or mailed to the purchaser, although such was not always done.

During the years in question the partnership and the corporation sold used cars to various used car dealers in the Miami area. The customer to which the greatest number of the cars here involved were sold was R. S. Evans Motors of Florida, Inc., hereinafter referred to as Evans Motors. Evans Motors, together with its 15 or 16 related corporations, claimed to be the biggest used car dealer in the country.

In 1945 Evans Motors employed Robert Muir as a salesman, then advanced him first to general manager and later to president in 1946 and 1947. During this period

L. P. Evans was also employed by Evans Motors and became president of the company after Muir left. Muir and Evans both engaged in buying and selling used cars for Evans Motors, and they were the only two individuals authorized by Evans Motors to buy used cars for it up until the time Muir's employment was terminated.

Shortly after Muir became general manager of Evans Motors, he and L. P. Evans contacted Sydney and Charles in an effort to buy used cars from the partnership. In view of the fact that the Nash Motor Co. had started producing new cars sooner after the war than most other automobile manufacturers, the partnership came into possession of a good number of used cars taken as trade-ins on new car sales. Following a discussion of the matter with the brothers, Sydney and Charles agreed to sell used cars to Evans Motors but only if the purchase price of certain cars was paid partly by check and the remainder in cash. The arrangement agreed upon was that either Muir or Evans would negotiate a price for various used cars with either Sydney or Charles from time to time. Invoices for the cars would then be prepared by Nash reflecting a sales price for each car sold. If the sales prices reflected on the invoices equaled the negotiated price for the cars, the entire amount would be paid by Evans Motors by check. But if the prices reflected on the invoices were less than the negotiated prices, Evans Motors was to pay the amount reflected on the invoice by check and the balance by cash paid to either Sydney or Charles. During the period here involved and until the latter part of 1948, Evans Motors bought a large number of used cars from the Nash partnership and corporation under this arrangement. Some of the cars bought were invoiced to

Evans Motors at the negotiated price; some of them in each of the years 1946, 1947, and 1948 were invoiced to Evans Motors at a price lower in amount than the negotiated price. In the latter instances Evans Motors paid the price reflected on the invoices by check made payable to the partnership or the corporation, and paid the balance of the negotiated price to Sydney or Charles, or both, in cash. The sales prices reflected on the invoices were the only amounts recorded in sales on the books of the partnership and the corporation and were the only amounts included in income on the tax returns filed for the partnership and the corporation.

In those instances in which the cars purchased from Nash were invoiced at a price lower than the negotiated price, it was necessary for Evans Motors to devise some method to record the full cost of used cars purchased. Two checks were drawn by Evans Motors, one payable to Nash Miami Motors in the amount of the invoice price, and a second check drawn to either Muir, or L. P. Evans, or one of the Evans' controlled corporations to cover the balance of the purchase price. The second check was then cashed by Muir or L. P. Evans and the cash, together with the first check, was delivered to either Sydney or Charles. In those instances where Muir had negotiated the purchase of the used cars from Nash, Muir made the cash payments to either Sydney or Charles, or both. When L. P. Evans purchased the cars, he dealt with Charles and made the cash payments to Charles. At first the second check was charged by Evans Motors to an account other than inventory, such as entertainment, travel, or advertising. However, when Evans Motors employed a bookkeeper or accountant as internal auditor of the books in about July

1946, he inquired what these charges were for, and when advised that they were a part of the original cost of the cars, he instructed that the checks covering the cash payments be charged to inventory, as were the checks covering the invoice price. This procedure was followed thereafter.

The check vouchers for both checks were keyed to each other, reflecting the stock numbers and a description of the cars the checks were used to purchase. Evans Motors also prepared an inventory card for each car purchased which reflected the make, model, and year of the car, the stock number assigned thereto, from whom the car was bought, and the purchase price. Where the purchase price was paid with the proceeds from two checks, the inventory cards usually made reference to both check numbers, which were usually either consecutive or close in number and date. A comparison of the books and records of Evans Motors with those of the Nash partnership and corporation reveals that in a number of instances in each of the years 1946, 1947, and 1948 the cost of specific cars bought by Evans Motors from Nash as recorded on the books of Evans Motors exceeded considerably the sales price of the same cars as recorded on the books of Nash.

In late 1947, Muir was released from his employment with Evans Motors for alleged embezzlement of various sums of money from that company. Subsequent to that time Muir organized his own business, A. A. Auto Sales-Rentals, Inc., to buy and sell used cars. A. A.'s main source of supply of used automobiles was the Nash corporation, and from October 1947 through May 1948, Muir purchased various used cars from the Nash corporation on

behalf of A. A. With respect to such sales the Nash corporation issued invoices which were less in amount than the agreed upon selling price. In paying for the cars purchased from Nash, A. A. issued its checks payable to Nash in the amount of the invoices and paid the remainder of the selling price in cash. Muir delivered the cash payments to Sydney or to Charles. The Nash corporation recorded on its books and reported on its income tax returns only the selling price shown on the invoices.

The business of A. A. Auto Sales-Rentals, Inc., was terminated when it was discovered that Muir had sold automobiles in violation of the terms of trust receipts which had been issued to finance companies to secure loans made to acquire the automobiles. In the latter part of 1948 or early in 1949, and continuing for about a year, during which time the returns of the Nash partnership and corporation were under investigation by respondent's agents, Muir was employed as sales manager of the Nash corporation. His employment was terminated in a dispute with Sydney over a bonus.

In 1946 the Nash partnership sold some used cars to Julius Stern, who was engaged in the automobile rental business in Miami. When Stern's employees advised Stern that they had found a suitable used car at the Nash place and had negotiated a price therefor, they also told him he would have to pay the purchase price by check in the amount of the Nash invoice price and the balance in cash. Stern agreed to do this in order to get the cars and also because he felt that the invoice price was considerably less than the cars were worth. On most occasions Stern gave the check and cash to his employees, one of whom was his

brother, who delivered them to Nash and picked up the car. On some occasions when Stern felt the purchase price negotiated by his employees was rather high, he would personally look over the automobile and then leave the check and cash in the Nash office. The only amount entered on the books of the Nash partnership as sales and the only amount included in the income reported by the partnership was the sales price shown on the invoices.

During the latter part of 1946 the Nash partnership sold 14 or 15 used cars to Jack Wein, doing business as Gem Motor Sales. Wein, often accompanied by his wife, Billie, negotiated most of his purchases of cars with Sydney. When the purchase price was agreed upon, an invoice for part of the negotiated price was issued by Nash. Wein paid the invoice price by check drawn to the partnership and paid the balance of the negotiated price to Sydney in cash. The only amount entered on the books of the Nash partnership as sales and the only amount included in the income reported by the partnership was the sales price shown on the invoices. The invoice prices were usually about 50 percent of the negotiated price.

Don D. Reed and Robert E. Gilmore, doing business in partnership as Regil Motors, also bought used cars from the Nash partnership and corporation during the years 1946-48. The purchases were negotiated with either or both of Sydney and Charles. The negotiated purchase prices were paid for with finance company checks and cash. Regil Motors prepared an envelope customarily used by used car dealers, for each car purchased. The title papers and invoices, when received, were placed inside the envelope, and information identifying the car was en-

tered on the face of the envelope. The price paid for the car was written down under the flap of the envelope by the purchaser of the car, and this information was later transferred to the books of Regil Motors. A comparison of the amounts reflected on the books and records of Regil Motors as the purchase price of used cars bought from Nash with the sales prices for those cars recorded on the books and records of the Nash partnership and corporation indicates that in most instances the former were considerably in excess of the latter.

C. L. Northcutt, whose wife was employed as office manager by Nash, bought used cars from Nash during 1947 and 1948, both in his individual capacity and as a partner in P. & N. Motors. He dealt almost exclusively with Charles prior to Charles' death, and paid cash for the cars he bought most of the time. He recorded the purchase price of each car on the customary envelope and this was later transferred to his records. After respondent began investigating the returns of the Nash partnership and corporation, Northcutt's wife compared the purchase price of the cars purchased from Nash as shown on Northcutt's books with the sales price of those cars as shown on Nash's books and found that the latter was about 50 percent of the former. The only amount reported as sales by the Nash partnership and corporation on the income tax returns filed by them were the sales prices shown on their books.

Edward J. Lennon was employed as a parts salesman by the Nash corporation in 1947 and 1948. He bought a used car from the corporation in 1948 and paid $300 cash for it, at the request of Charles. The sales price of this

car was recorded on the books of the Nash corporation as $100 and the latter amount was the only amount included in its income reported on its tax return.

In addition to the above-mentioned sales the Nash partnership and the Nash corporation sold used cars to other used car dealers and individuals.

In late 1944 or early 1945, Charles and Sydney opened a joint account at the First National Bank of Miami Beach. The account was in the name of "C & S Ginsberg" and remained open until after the death of Charles in September 1948. Sydney made no deposits in the account. After Charles died, the account was divided equally between Charles' estate and Sydney.

In its partnership returns of income for the fiscal years ended May 31, 1946 and 1947, the Nash partnership included in gross sales as gross sales of used automobile only the amounts entered on its books from such sales. In his income tax returns for the calendar years 1946 and 1947 Sydney reported as income from the Nash partnership only the amounts shown as his distributive share of partnership income on the partnership returns for its fiscal years ended May 31, 1946 and 1947, respectively.

In its corporation income tax returns for the fiscal years February 1, 1947, through November 30, 1947, and December 1, 1947, through November 30, 1948, the Nash corporation included in gross sales as gross sales of used automobiles only the amounts entered on its books from such sales. Neither of the returns disclosed any distribu-

tions by the corporation to its stockholders of any earnings or profits during the respective fiscal years. The only income reported in Sydney's income tax returns for 1947 and 1948 as having been received from the Nash corporation was the sum reported as compensation received from the corporation.

In determining the deficiencies involved in docket No. 68316 against Sydney for the calendar years 1946 and 1947, respondent determined that in its partnership returns of income for its fiscal years ended May 31, 1946 and 1947, the Nash partnership had understated sales from used automobiles in the amounts of $12,147.50 and $59,151.50, respectively, and that, accordingly, Sydney's distributive share of partnership net income shown thereon had been understated by one-half of those amounts, or $6,073.75 and $29,575.75, respectively, and that Sydney's distributive share of partnership net income as reported in his income tax returns for 1946 and 1947 had been understated by the latter amounts, respectively.

In determining the deficiencies in docket No. 68315 against Nash Miami Motors, Inc., for its fiscal years ended November 30, 1947 and 1948, respondent determined that the Nash corporation understated its income from sales of used automobiles in the amounts of $42,015 and $22,675, respectively.

Also, in determining the deficiency for 1947 against Sydney, in docket No. 68316, respondent determined that Sydney received dividends from the Nash corporation which he failed to report on his income tax return for 1947 in the amount of $23,912.50. In its amended answer

in docket No. 68316 respondent alleges that the $23,912.50 represents one-half of the unreported sales of the Nash corporation during the calendar year 1947 converted in equal shares by Sydney and Charles to their own use.

The Nash partnership kept its books and filed its returns of income for its fiscal years ended May 31, 1946 and 1947, on an accrual basis. The Nash corporation kept its books and filed its income tax returns for its fiscal years ended November 30, 1947 and 1948, on an accrual basis.

In its income tax return for its fiscal year ended November 30, 1947, the Nash corporation showed that it had earned surplus and undivided profits in the amount of $24,920.19. In its return for its fiscal year ended November 30, 1948, it showed that it had earned surplus and undivided profits of $74,924.79 at the end of that year.

Opinion.

The question basic to all three of these issues is whether Sydney and Charles Ginsberg, acting in behalf of the Nash partnership and its successor, the Nash corporation, sold used cars at prices greater than reflected on the sales invoices and recorded on the books and tax returns of the partnership and the corporation, the unrecorded portion of the sales prices being received in cash and diverted by Sydney and Charles to their own use.

Respondent acknowledges that the partnership and the corporation maintained a complete and regular set of books for their businesses, that the gross sales recorded

on the books correctly reflected the amount of sales as shown on the used car sales invoices, and that the partnership and the corporation returns were prepared from the books and records and correctly reported the used car sales as shown therein. But in the course of auditing the partnership and the corporation returns for the years here involved, the suspicions of respondent's agents were aroused by the fact that the markup on so many of the used car sales was exactly $50 so he compared the sales prices reflected on the Nash books with the purchase price reflected on the books of the purchasers of those used cars, and discovered there was often a discrepancy. Upon completion of the investigation by his agents, respondent determined that the partnership had understated its used car sales for its fiscal years ending May 31, 1946 and 1947, by the amounts of $12,147.50 and $59,151.50, respectively, and that the corporation had understated its used car sales for its fiscal years ending November 30, 1947 and 1948, in the amounts of $42,015 and $22,675, respectively. This determination was arrived at by adding to used car sales reported by the Nash partnership and corporation the difference between the sales prices of specific cars as shown on the Nash books and the purchase price paid for the same used cars as shown on the books and records of the purchasers of those cars. Evidence was submitted which revealed the detail supporting respondent's determination.

Respondent's determinations are presumed to be correct and the burden of proving that they are erroneous lies on petitioners. Petitioners made no effort to show that respondent's determination of the amount omitted on any particular sale was in error—and such a task

would have been difficult indeed unless a second set of books had been kept by the Ginsbergs, which was not likely under the circumstances. Instead, petitioners relied on the books and records of the partnership and the corporation as correctly reflecting their gross sales and attempted to discredit the books and records of the purchasers to show wherein respondent erred. Consequently, unless we conclude that petitioners succeeded in proving that respondent was in error in relying on the books and records and statements of the purchasers to determine the deficiencies, we must approve respondent's determinations as to the amounts involved in these issues.

Petitioners produced very little direct evidence on these issues. Their only witness on these issues was Sydney, who testified that neither he nor Charles, nor anyone else acting in behalf of Nash, to his knowledge, ever received more than the invoice price for the sale of used cars by Nash. Sydney's testimony deserves consideration, which it has been given, because he was in a position to know, but the weight to be afforded his testimony must be determined in the light of his self-interest in the proceedings and the directly conflicting testimony of the numerous witnesses produced by respondent.

Respondent, who had the burden of proving fraud, offered the testimony of at least seven witnesses who had purchased used cars from Nash during the period here involved, all of whom are mentioned in our Findings of Fact. Muir, Stern, and Billie Wein, whose deceased husband operated Gem Motor Sales testified that in order to buy used cars from Nash, they were required to pay the invoice price by check, and an additional amount in cash.

Muir's testimony is supported by the testimony of L. P. Evans, deceased, given at Sydney's trial for criminal tax evasion.3 The testimony of these witnesses was also supported by their books and records reflecting the purchase price of the cars. Reed, Gilmore, and Northcutt each testified that they paid cash, and in some instances finance company checks, for cars purchased from Nash and recorded the amounts paid on their records. In each instance the amounts claimed to have been paid by the purchasers exceeded the amounts reflected on the Nash books. Lennon, a former employee of Nash, testified that he bought a used car from the corporation in 1948 for $300, which Charles insisted he pay in cash. The sales price was recorded in the corporate books as $100.

After a careful review of all the evidence presented at the trial of this case, we are unable to conclude that respondent's determination that the Nash partnership, for its fiscal years ended May 31, 1946 and 1947, and the Nash corporation, for its fiscal years ended November 30, 1947 and 1948, failed to report sales of used cars in the respective amounts determined by him was erroneous. On the contrary, we think the evidence shows that Charles and Sydney formulated a plan to receive sums in excess of the selling prices recorded on the books of the partnership and the corporation, which they followed throughout the years here involved, which had as its purpose the concealment of such receipts not only from the employees who kept the books of the enterprise but anyone else who might examine the books as well.

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3 United States v. Ginsberg, an unreported case (S. D. Fla. 1958), reversed and remanded 257 F. 2d 950 (1958).

In reaching this conclusion we have given careful consideration to petitioners' objections to some of the evidence sumitted by respondent, particularly the books and records of Evans Motors, and to their attack on the testimony of some of respondent's witnesses, particularly the testimony of Robert Muir. Petitioners centered their attack on the books and records of Evans Motors, with which most of the sales upon which the deficiencies are based were transacted, claiming that because of Muir's character, his self-interest, and previous inconsistent statements made by him, his testimony should not be relied upon, and inasmuch as he was the source of much of the information upon which the entries in the Evans Motors' books were based, those books and records were not to be relied upon either. The books and records of Evans Motors were properly identified by the internal auditor who supervised the keeping of those books and there is no evidence that those books did not correctly reflect the used car purchases based on the information given the bookkeepers by Muir and L. P. Evans. The canceled checks, check vouchers, and inventory cards of Evans Motors were also introduced in evidence to support the books and the testimony of respondent's witnesses.

In support of the testimony of the other used car dealers to whom Nash sold cars giving rise to the deficiencies, the envelopes upon which the purchase price and other information was originally recorded by the purchasers were offered in some instances and properly identified. The canceled checks and check stubs of Stern were offered and properly identified by him. Summaries made from those records and sworn to by the witnesses, listing each car purchased from Nash and the amounts paid

therefor, most of which were used as evidence in the criminal income tax trial of Sydney 4 the trial in this Court Court involving the income tax liability of Charles, hereinafter mentioned, were also offered and identified by the witnesses. We have been cited no grounds which we think justify rejecting any of the documentary evidence admitted, and we deny petitioners' various motions to strike such evidence; but even without such, we think the oral testimony of the witnesses themselves shows a pattern of conduct on the part of Charles and Sydney which proves that the books and records of Nash did not reflect the entire gross sales of used cars.

We recognize that by inflating the purchase price of the used cars they resold, the used car dealers might reduce their own taxable profit and that it could have been to their interest to falsify their records and their testimony in this respect. We also recognize that Muir and L. P. Evans could have been using the second check to obtain funds from Evans Motors for their own use. However, we observed Muir and the other witnesses carefully while they were on the witness stand and in our opinion the testimony they gave was credible. It would be impossible to conclude with certainty that all of the cash payments found their way into the hands of Charles and Sydney, but in our view of the evidence presented we cannot find that respondent erred in using the method he used in determining the unreported sales of the Nash enterprises.

Petitioners' argument that an analysis of the profit reported by Nash on the sales of used cars was greater

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4 See infra under fraud issue.

than that reported by Evans Motors is entitled to little weight in our opinion. There is evidence that because of the OPA controls on the prices for which new cars could be sold during this period, new car dealers often allowed less on the old car received in trade than would normally have been allowed. This gave them a low cost in the used cars and it would not have been difficult to realize a substantial book profit on these cars by selling them at $50 above cost. Thus Nash could show a fairly good profit percentagewise by recording the sale of used cars at $50 above cost. The books of Nash reflect that this $50 markup was used with rather surprising consistency throughout the period here involved, despite the fact that the used car dealers all testified they negotiated the prices paid for all cars with Sydney or Charles, which Sydney did not deny. Furthermore, it seems rather unlikely that Sydney and Charles, who had been in the automobile business before and presumably knew the market for used cars, would have been satisfied with an average profit of about $50 per used car when the evidence indicates that these cars were being resold by the used car dealers at much higher prices than the prices for which Nash purportedly sold these cars to the dealers.

Petitioners have failed to prove that respondent erred in the method he used in determining that the Nash partnership and the Nash corporation understated their sales of used cars, and have failed to prove that he erred in determining the amounts thereof. Respondent's determinations of such amounts are accordingly approved.

Since Sydney was an equal partner in the Nash partnership and formulated and participated in a course of

conduct whereby he received amounts from the sale of partnership used cars not recorded on the partnership books, we are unable to find that respondent erred in determining that Sydney's distributive share of the partnership income for its fiscal years ended May 31, 1946 and 1947 was understated by one-half of the amounts repondent determined that the partnership sales were understated for those years. Starr v. Commissioner, 267 F. 2d 148 (C.A. 7, 1959).

Sydney and Charles were the principal officers and stockholders of the Nash corporation until Charles' death in September 1948, and they dominated and controlled the conduct of its business. They received amounts upon the sale of used cars owned by the corporation which were not reported on the corporation's books or returns. They were acting in behalf of the corporation in making such sales and the entire amounts received were properly income to the corporation. United Dressed Beef Co., 23 T.C. 879 (1955). We find no error in respondent's determination that the corporation understated its sales and income by the amounts stated in the deficiency notice in docket No. 68315.

There is no indication in the record nor contention by the petitioners that Sydney and Charles expended these unreported amounts for the benefit of the corporation. Under these circumstances the amounts so received and retained by them constitute taxable dividends to them. Jack M. Chesbro, 21 T.C. 123 (1953, affirmed per curiam 225 F. 2d 674 (C.A. 2, 1955), certiorari denied 350 U.S. 995 (1956). Neither is there any evidence that Sydney and Charles did not share these amounts equally. So de-

spite the fact that Sydney owned only 45 percent of the stock of the corporation while Charles owned 50 percent, we find no error in respondent's determination that 50 percent of the amount which he determined the corporation had failed to report as sales during the calendar year 1947 constituted taxable income to Sydney as dividends in 1947.

Issue 4. Whether the Nash partnership was entitled to deductions in arriving at its net income for its fiscal year ended May 31, 1947, for (a) a loss on the sale of partnership real estate; and (b) an adjustment made to its inventory of parts and supplies.

(a) Loss on Sale of Partnership Real Estate.

Findings of Fact.

As previously set forth in our General Findings of Fact, Sydney and Charles owned, in behalf of the Nash partnership, the lot on the Venetian Causeway occupied by the partnership as its place of business, for which they had paid $35,002.70, and upon which the partnership had constructed a building costing $160,043.38. This property was encumbered by a mortgage in the principal amount of $100,000, upon which there was a balance due on January 31, 1947, of $97,500.

By entry on its books, dated January 31, 1947, the Nash partnership wrote down the total cost of the land and building by $65,046.08, or from $195,046.08 to $130,000, by crediting the property account, and by debiting profit and loss in the amount of $63,449.10 and the reserve for depreciation on the building in the amount of

$1,596.98. The journal explanation for the foregoing action was as follows:

To record loss on building due to increase of labor and material at time of building it. See appraisal figure by Lon Worth Crow.

The "appraisal figure" referred to was stated in a letter to Sydney and Charles from Lon Worth Crow, dated February 27, 1947, which read as follows:

Referring to your inquiry as to the Stabilized Value on your property at 545 N.E. 15th Street, Miami, Florida, known as the Nash Miami Motors, which you own and are now occupying, it is my opinion that the property has, as of today, a Stabilized Value of $130,000.00.

By warranty deed recorded May 1, 1947, the land and building were conveyed by Sydney and Charles, and their wives, to Venetian Realty, a corporation organized on February 18, 1947, the capital stock of which, totaling $10,000, was held 1 share by each of Sydney and Charles, and 4 shares by each of their wives. In consideration of the conveyance, Venetian Realty agreed to assume the mortgage, which then had an unpaid balance of $97,500, and issued a promissory note payable to the Nash partnership in the amount of $32,500. The property was set up on the books of Venetian Realty at a cost of $130,000. Thereafter Venetian Realty rented the property to the Nash corporation for a rental of $2,500 per month.

On its partnership return of income for its fiscal year 1947 the partnership reported a loss on the sale of the land and building in the amount of $63,449.10 com-

puted by deducting from a cost of $195,046.08 the sales price of $130,000 and depreciation in the amount of $1,596.98. This loss was reported as a loss on the sale or exchange of property other than capital assets, and the entire amount of the loss was deducted from ordinary income in computing the net income reported by the partnership. This reduced the distributive share of partnership income reported by Sydney on his individual return for 1947 by $31,724.55. Respondent disallowed the deduction on the partnership return and determined that Sydney's distributive share of the partnership income should be increased by $31,724.55 as a result thereof.

Opinion.

It is difficult to determine petitioner's exact position on this issue. He presented no evidence on the issue except the letter from Crow referred to in our Findings of Fact and the testimony of Lyndon C. Conlon, a CPA who was employed in December 1948 to audit the books of the Nash enterprises. Crow was apparently deceased at the time of this trial. His letter was received in evidence over respondent's objection only to show that such a letter had been received, not as proof of the value of the land and building as of the date thereof. The letter alone was clearly inadmissible to prove value, and petitioner offered no other witnesses to prove value. Conlon testified that he had verified the cost of the property from the books of the partnership and that the books reflected the writedown of the property as set forth in our Findings of Fact. No evidence was offered as to the circumstances under which the property was written down on the books of the partnership or as to the circumstances under which the property was transferred to Venetian Realty, a corporation

owned by the partners and their wives, for considerably less than its adjusted cost.

Based on this lack of evidence alone we would have to conclude that petitioner has failed to carry his burden of proving that respondent erred in disallowing this loss to the partnership and concomitantly increasing Sydney's distributive share of the partnership income by one-half thereof.

Petitioner takes the position on brief that because section 24(b)(1) of the 1939 Code does not specifically disallow a loss on the sale or exchange of property between a partnership and a corporation, this loss should not be disallowed. This Court rejected that argument in Fritz Busche, 23 T.C. 709 (1955), affirmed per curiam 229 F. 2d 437 (C.A. 5, 1956), concluding that the sale by a partnership to a controlled corporation was a sale by the partners and that section 24(b)(1) was applicable. Respondent also claims that the sale was not a bona fide sale at arm's length, and that the loss should not be allowed for that reason. On the evidence we have before us this argument would appear to have validity. We have no explanation why the partnership would sell property in an arm's-length transaction for $130,000 when the property had cost it $195,046.08 less than a year earlier. And if the property was worth only $130,000 in 1947, we question that Sydney and Charles would have agreed in an arm's-length transaction to have their corporation pay rent of $2,500 per month, or $30,000 per year.

We find no error in respondent's determination on this issue.5

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5 In Estate of Charles J. Ginsberg, T. C. Memo. 1958-95, affd. 271 F. 2d 511 (C.A. 5, 1959), this Court found that the same conveyance with which we are concerned here was not an arm's-length transaction, that the evidence would not permit a finding that $130,000 correctly reflected the value of the property at the time of the conveyance or that the partnership suffered a loss, and sustained respondent's disallowance of the loss. Petitioners apparently presented more evidence on this issue at the trial of that case than was presented here—but the Court still disallowed the loss.

That case involved the income tax liability of Charles Ginsberg for the years 1946 and 1947 based on most of the same transactions with which we are concerned here. However, because the taxpayers here are different parties than the taxpayer there, and because most of the issues involved here are factual, we have been very careful to consider the issues presented here only on the record made in this case. If some of our findings and conclusions here are the same or similar to our findings and conclusions in that case, it is only because in our opinion the record presented in this case supports such findings and conclusions.

On this issue and the next issue, however, the real party involved, the partnership, was the same in both cases and we would find it difficult to reach a conclusion on those issues here contrary to those reached

(b) Inventory Adjustments.

Findings of Fact.

As of February 1, 1947, the Nash corporation succeeded the Nash partnership in the operation of the Nash dealership and as of that date acquired the automobile parts and other items of inventory which the partnership then had on hand. No physical inventory of the parts and other inventory items appears to have been taken by either the partnership or the corporation. However, the partnership caused a spot check to be made of certain items of inventory.

As of January 31, 1947, certain of the partnership inventory accounts were written down on its books and charged to profit and loss in the total amount of $7,229.95. The following partnership accounts were credited with the amounts indicated:

Parts inventory	$5,129.37
Accessories inventory	1,440.04
Gas, oil, and grease inventory	79.45
Paint materials inventory	581.09

The entry was explained on the books as follows:6

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in the Estate of Charles J. Ginsberg case, particularly where there appears to have been more evidence offered by petitioners on those issues in the earlier case than was presented here.

6 This explanatory entry was requested as a finding of fact by both parties and also appears as a finding of fact in the Memorandum Opinion of this Court in

To compute for shortages, breakage, deteriorating, etc. inventory appraised at 60 per cent of value per audit Mr. Rainer.

In its returns of income for its fiscal years 1946 and 1947, the partnership stated that its inventories were valued at the "Lower of Cost or Market."

Respondent disallowed the above-claimed losses in determining the partnership net income for its fiscal year ended May 31, 1947, and increased Sydney's distributive share of the partnership net income for 1947 by one-half of the above amount, of $3,614.98.

Breakages in the parts and accessories inventories and shortages in the parts, accessories, gas, oil, and grease, and paint materials inventories of the partnership amounted to $1,000 in its fiscal year 1947.

Opinion.

The only evidence offered on this issue, other than the general ledger entries showing the credits to the various inventory accounts and the debit to the profit and loss account, was the testimony of Conlon, the CPA who was employed in December 1948 to audit the books of the Nash corporation. Conlon testified that in the course of his audit he noticed the above entries and upon inquiry with respect thereto found no evidence that a physical inventory had been taken but was advised that the partnership had

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the Estate of Charles J. Ginsberg case previously referred to, but we find no evidence in the record of this case to specifically support it.

caused a spot check to be made of the various parts and supplies inventory and that the writedown was made partly as a result thereof and partly because it was customary in the automobile business to reevaluate parts inventories periodically as newer models of cars were marketed. Conlon also testified that this method of marking down parts inventories was customary in automobile business accounting.

On this evidence alone we do not think petitioner has carried his burden of proving that respondent erred in disallowing this loss to the partnership and increasing Sydney's share of partnership income accordingly. We have no evidence of the actual value of the inventories as of January 31, 1947, or why it was decided to mark them down approximately 40 percent. Conlon, who was not employed by the Nash corporation until December 1948, had no personal knowledge of why the entries were made or the justification therefor. While Conlon testified that Nash had consistently followed this practice of marking down its parts inventory a certain percentage each year, we believe his testimony referred to the years subsequent to the time he was employed to audit the books of the Nash corporation and prepare its returns. The partnership general ledger for these inventory accounts for the period ended May 31, 1946, reflects no similar markdown of these inventories.

On brief respondent states that on the basis of this Court's decision in Estate of Charles J. Ginsberg, T.C. Memo. 1958-95, affd. 271 F. 2d 511 (C.A. 5, 1959), on this issue he would be agreeable to allowing the partnership a deduction of $1,000 for breakage of parts and shortages of supplies as found by this Court in the earlier

case. Despite the paucity of evidence supporting such a conclusion in this record, we have nevertheless found that the partnership did suffer some loss in its inventory accounts from breakages and shortages, and have fixed the amount at $1,000, consistent with the earlier case and respondent's position announced on brief.

Sydney's distributive share of the partnership net income was understated on his 1947 return by the amount of $3,114.98 because of the inventory adjustment made by the partnership.

Issues 5 and 6. Fraud and the Statute of Limitations.

Findings of Fact.

References is made to our Findings of Fact on Issues 1, 2 and 3, in connection with the fraud issue.

Sydney and Charles were the sole partners of the Nash partnership, and were the principal officers and stockholders of the Nash corporation. They jointly controlled the affairs and dictated the policies of both the partnership and the corporation. The partnership and the corporation, which were primarily in the business of selling new Nash automobiles, received used cars as trade-ins on the new cars sold. Most of the used cars were sold to used car dealers in the Miami area and others were sold to individuals. Sydney and Charles, at times jointly, and at times individually, negotiated the sales of the used cars and determined the prices for which they were sold. Because of the shortage of automobiles in the postwar period, they were able to demand inflated prices for the used cars.

In transactions with some of the used car dealers, Sydney and Charles required the purchasing dealer to pay the invoice price for the cars purchased by check made payable to Nash and to pay the balance of the negotiated price to them in cash. Other dealers paid the entire negotiated price to Sydney and/or Charles in cash, irrespective of the price stated on the invoices issued by Nash. Sydney and Charles told the company bookkeeper how much to issue the invoices for on cars they sold. This price was often considerably less than the negotiated sales prices actually received by Sydney and Charles for the cars sold.

The bookkeeper, having no independent knowledge of the prices for which the used cars were sold, issued the invoices in the amounts instructed by Sydney and Charles and gave the original of the invoice to the purchaser if he wanted it and kept a copy for the Nash files. Only the amounts shown on the invoices were entered as gross sales on the Nash books. The tax returns for both the partnership and the corporation were prepared from the books and reported as gross sales only the invoice prices of used cars sold. Sydney and Charles retained the excess of the cash received over the invoice prices for their own use and did not use it for partnership or corporate purposes. The unrecorded payments received by Sydney were not included in the income reported on the income tax returns of either Sydney or the partnership or the corporation.

Sydney was indicted under section 145(b) for evasion of his individual income taxes for the years 1946, 1947, and 1948, and as an officer of the Nash corporation for evasion of the corporation's income tax for its fiscal years 1947 and 1948. He was found not guilty of personal income tax evasion for the years 1946 and 1947 and guilty

on the other charges. On appeal, the convictions were reversed for errors in evidence. Thereafter, Sydney entered a plea of nolo contendere to evasion of the corporation's taxes for 1948, and the other charges were not pressed.

Sydney's individual income tax return for the years 1946 and 1947 were filed on or about March 15, 1947 and 1948, respectively. Sydney executed a consent extending the period of limitation for assessment of his income taxes for the years 1946 and 1947 to June 30, 1953. No other such extentions were executed by Sydney. The statutory notice of deficiency in docket No. 68316 was mailed by respondent to Sydney on March 27, 1963.

The Nash corporation filed corporation income tax returns for its fiscal years ended November 30, 1947 and 1948, on or about February 15, 1948 and 1949, respectively. Sydney, in behalf of the Nash corporation, executed a consent extending the period of limitation for assessment of the corporation's income tax for its fiscal years 1947 and 1948 to June 30, 1953. No other such extensions were executed by the Nash corporation. The statutory notice of deficiency in docket No. 68315 was mailed by respondent to the Nash corporation on March 27, 1957.

A part of the deficiencies in Sydney's income taxes for both of the years 1946 and 1947 was due to fraud with intent to evade tax. Sydney's income tax returns for both 1946 and 1947 were false or fraudulent with intent to evade tax.

A part of the deficiencies in the Nash corporation's income taxes for its fiscal years ended November 30, 1947 and 1948, was due to fraud with intent to evade tax. The

Nash corporation's income tax returns for both of its fiscal years 1947 and 1948 were false or fraudulent with intent to evade tax.

Opinion.

Assessment and collection of any deficiencies in the income taxes of Sydney for the years 1946 and 1947 and of the Nash corporation for its fiscal years 1947 and 1948 is barred by the statute of limitations unless the returns were false or fraudulent with intent to evade tax. Sec. 276(a), I.R.C. 1939. The burden of proving fraud is on respondent and he must prove it by clear and convincing evidence. L. Glenn Switzer, 20 T.C. 759 (1953). We find that respondent has carried that burden with respect to both petitioners.

The evidence is clear and convincing that Sydney and Charles jointly devised a plan for reporting and recording the sales of used cars so that the full amount of the sales prices of some of the used cars sold was not revealed to the bookkeepers of the partnership and the corporation and consequently a part of the sales prices of those cars was never included in gross sales recorded on the books of the partnership or the corporation was not included in the income reported on their tax returns or the returns of the partners. Both Sydney and Charles were aware of this fact and both participated in this course of conduct which could only have had as its principal purpose the evasion of payment of income tax on the full income of the corporation and the partners. Our discussion of the evidence under Issues 1, 2 and 3 reflects our reasons for concluding that both Sydney and Charles participated in this plan, and no reason other than tax evasion is advanced, nor can

we envision one, for pursuing this course of conduct. As a result of their conduct, the books and records of the partnership and the corporation failed to reflect all the income from the business, and the income tax returns of both the individual partners and stockholders and the corporation, based thereon, were false and fraudulent.

Sydney's at times somewhat obscure effort to cast the entire blame for any wrongdoing on his deceased brother Charles at the trial of this case is supported by neither the record nor the credulity of the trial judge. While the evidence does indicate that Charles was more active in the sales of used cars than was Sydney, the unimpeached testimony of several of respondent's witnesses clearly proves that some of the excess cash payments were made to Sydney alone and to Sydney and Charles jointly. Furthermore, we cannot believe that one of these two brothers, who had been closely associated in business all their lives, would have attempted to or could have engaged in such a course of conduct without the other brother knowing about it and receiving his share of the benefits from it. There is no evidence that Sydney did not share equally with Charles in all profits from the business.

Petitioners based their defense on the fraud issue almost entirely on an effort to discredit the testimony of Robert Muir and the books and records of Evans Motors. But even had they succeeded this would have left unimpeached the direct testimony of Stern and Wein that they were required to and did make cash payments in excess of the invoice prices in order to buy cars from Nash, and the undisputed fact that the books and records of various other used car dealers show that they paid more for the used cars purchased from Nash than was recorded in sales

on the books of Nash. It matters not on this issue that all of the excess cash may not have reached the hands of Sydney or Charles — if any part of the deficiency is proven to be due to fraud with intent to evade tax, the addition to tax under section 293(b), I.R.C. 1939, applies to the entire deficiency. Ginsberg's Estate v. Commissioner, 271 F. 2d 511 (C.A. 5, 1959).

Sydney and Charles were the owners of practically all the stock of the Nash corporation, were its principal officers, and controlled the conduct of its business, its policies, and its bookkeeping. Sydney and Charles both signed the income tax returns of the corporation for its fiscal year 1947, and Sidney signed the 1948 return as president of the corporation. Under the circumstances the intent of these two officers and stockholders and their actions in behalf of the corporation are to be imputed to the corporation. Auerbach Shoe Co., 21 T.C. 191 (1953), affd. 216 F. 2d 693 (C.A. 1, 1954). The facts in this case permit of no other conclusion than that the corporation's income tax returns for its fiscal years 1947 and 1948 were fraudulently filed with the intention of evading tax.

Our finding of fact that a part of the deficiencies in income tax of both Sydney and the corporation for the tax years involved were due to fraud with intent to evade tax requires the application of the 50-percent addition to tax under section 293(b), and respondent is sustained on this issue. Our finding of fact that the returns of both Sydney and the corporation for the years involved were fraudulent with intent to evade tax lifts the bar of the statute of limitations under section 276(a), and assessment of the deficiencies found to be due is not barred.

Issue 7: Whether a Judge of the Tax Court is Qualified to Determine the Issues.

Opinion.

In reply to respondent's second amended answer, petitioner Nash Miami Motors, Inc., alleges —

that none of the judges of the Tax Court of the United States, as the same is now constituted, are qualified to hear and determine the issues raised in the second amended answer in that all of said judges were or have been appointed for a term of years, contrary to Article III, Section One of the Constitution, wherein it is provided that all judges of the Supreme Court and inferior Courts shall hold their offices during good behavior.

However appealing petitioner's argument that the judges of this Court must be appointed for a term of good behavior at irreducible salaries may be to the individual judges of this Court, we do not believe this argument can be of any aid to petitioner in this Court.

The Tax Court of the United States was originally established by an act of Congress in 1924 (43 Stat. 336) as the Board of Tax Appeals to permit taxpayers to secure a determination of tax liability before payment of the deficiency. It is still the only forum available to taxpayers for that purpose. Flora v. United States, 362 U.S. 145 (1960). Provisions with respect to its status, jurisdiction,

and personnel are now contained in section 7441, et seq., I.R.C. 1954.7

Petitioner elected to invoke the jurisdiction of the Tax Court for a redetermination of its tax liabilities rather

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7 Sec. 7441. Status.

The Board of Tax Appeals shall be continued as an independent agency in the Executive Branch of the Government, and shall be known as the Tax Court of the United States. The members thereof shall be known as the chief judge and the judges of the Tax Court.

* * * * *

Sec. 7443. Membership.

* * * * *

(e) Term of Office. — The terms of office of all judges of the Tax Court shall expire 12 years after the expiration of the terms for which their predecessors were appointed; but any judge appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor.

(f) Removal from Office. — Judges of the Tax Court may be removed by the President, after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other cause.

than pay the deficiency first and sue for refund in either a United States District Court or the Court of Claims. Just prior to the trial of this case petitioner also filed a complaint in the United States District Court for the Southern District of Florida against the United States, the Attorney General, and the Commissioner of Internal Revenue seeking to enjoin this Court from proceeding with this trial unless the trial be heard by a judge appointed for a term of his good behavior as provided by the Constitution. Nash Miami Motors, Inc. v. United States, an unreported case (S.D. Fla. 1963). That complaint was dismissed by order of the Court for lack of jurisdiction, which order of dismissal is now pending on appeal in the United States Court of Appeals for the Fifth Circuit.

In Henry Cappellini, 14 B.T.A. 1269 (1929), the Board of Tax Appeals refused to consider the constitutionality of an act under which the taxpayer had invoked the jurisdiction of the Board under the well-settled rule that one who invokes jurisdiction submits to it, and having submitted to it, waives all right to interpose any objection; and the equally well-settled rule that one cannot take advantage of a statute and then question its constitutionality. See also F. L. Bateman, 34 B.T.A. 351 (1936). We think the rules applied in those cases, and the authorities cited therein, are applicable here to prevent petitioner from successfully challenging the qualifications of a judge of this Court to determine the issues raised by the pleadings in this case.8

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8 If the judges of this Court are not qualified to determine the issues of tax liability and fraud raised herein, it would seem to follow that we are no more qualified to determine the constitutional issue raised by peti-

We assume that petitioner raised this constitional question in his reply to the affirmative issue of fraud pleaded by respondent in his answer to in some way avoid the arguments of waiver and estoppel. Having once waived the right to challenge the jurisdiction of this Court, petitioner waived that right with respect to all issues that are properly before the Court in this proceeding. See United States v. Shepard's Estate, 196 F. Supp. 281 (N.D.N.Y. 1961).

Decisions will be entered under Rule 50

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tioner. Furthermore, if the judges of this Court are not qualified to redetermine petitioner's tax liability, petitioner would appear to be left without remedy except to pay the tax and sue for refund. The Tax Court was created by Congress. Petitioner cannot force Congress to provide what petitioner considers to be a validly constituted Court. See Willmut Gas & Oil Company v. Fly, 322 F. 2d 301 (C.A. 5, 1963), certiorari denied 375 U.S. 984 (1964).

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 421

NASH MIAMI MOTORS, INC., AND SYDNEY GINSBERG, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The Commissioner of Internal Revenue determined that petitioners (an individual and his family corporation) had understated their income for the years 1946–1948 and that part of these deficiencies were due to fraud (R. 1443–1445, 1463).[1] The Commissioner assessed deficiencies and fraud penalties. Petitioners filed petitions in the Tax Court asking for redeterminations of the proposed deficiencies and later challenged the constitutional power of the Tax Court to de-

[1] "R." references are the printed record in the court of appeals.

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cide their case on the ground that all of the judges of that court are appointed for a term of years, rather than during good behavior as prescribed by Article III, Section 1, of the Constitution (R. 1331–1332, 1467). The Tax Court rejected this argument, holding that petitioners had waived their right to challenge its jurisdiction by voluntarily invoking it. On the merits, the Tax Court upheld the proposed deficiencies and additions for fraud (Pet. App. 22–66).

The Fifth Circuit affirmed the Tax Court (Pet. App. 11–17). It declined to dispose of the constitutional question on the ground of waiver, and held that, under the relevant Supreme Court decisions, the Tax Court could constitutionally adjudicate "claims against the United States" (*Ex parte Bakelite Corp.*, 279 U.S. 438, 452). The court of appeals stated, in part (Pet. App. 15–16):

> In waiving sovereign immunity and creating rights in individuals against the United States, Congress may provide "only an administrative remedy," or it may grant the claimant only a judicial remedy, or it "may give to the individual the option of either an administrative or a legal remedy." *Tutun* v. *United States*, 270 U.S. 568, 576–577; *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 573.
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> As the Supreme Court recognized in *Flora* v. *United States*, 362 U.S. 145 (1960), Congress has given the taxpayer two possible remedies: In certain circumstances he may litigate in the Tax Court subject to review by the courts of appeals and by the Supreme Court; in certain other circumstances he may sue in

the district court or Court of Claims subject to appellate review. The real thrust of petitioners' complaint is simply that they would have preferred to litigate their case in the district court without first having paid the taxes. This equal protection type argument was also, we believe, disposed of by the rationale of *Willmut* [*Gas & Oil Co. v. Fly,* 322 F. 2d 301 (C.A. 5), certiorari denied, 375 U.S. 984]. Cf. *Flora* v. *United States,* 362 U.S. 145 (1960), at 175–177.

The instant petition is directed solely to the constitutional question. We submit that petitioners' contentions (Pet. 6–14) are without merit. As the Fifth Circuit pointed out (Pet. App. 13–14), this Court has long held that functions such as those performed by the Tax Court may be entrusted by Congress to legislative courts whose judges do not have Article III guarantees. *Ex Parte Bakelite Corp.,* 279 U.S. 438, 451–452. Moreover this Court considered and rejected a substantially identical challenge to the Tax Court's constitutionality last term when it denied a motion for leave to file a petition for mandamus in *Ginsberg* v. *Fulton,* 382 U.S. 805. The instant petitioners have had their proposed tax deficiencies reviewed by both the Tax Court and an Article III tribunal (the Court of Appeals for the Fifth Circuit) and have suffered no deprivation of their constitutional rights.[2]

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[2] Cf. *Heiner* v. *Diamond Alkali Co.,* 228 U.S. 502, 507; *Welch* v. *Obispo Oil Co.,* 301 U.S. 190, 193–196; *Williamsport Co.* v. *United States,* 277 U.S. 551, 561.

There is no conflict of decisions,[3] the result reached by the lower courts is correct, and no further review is warranted.

Respectfully submitted.

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OCTOBER 1966.

[3] Indeed both the Fourth Circuit (*Amos* v. *Commissioner*, 360 F. 2d 358, 359) and the Seventh Circuit (*Martin* v. *Commissioner*, 358 F. 2d 63, 64) have recently rejected similar attacks upon the Tax Court's constitutionality.

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